



William C. Rava
PHONE: 206.359.6338
FAX: 206.359.7338
EMAIL: wrava@perkinscoie.com

1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
PHONE: 206.359.8000
FAX: 206.359.9000
www.perkinscoie.com

April 25, 2005

Clerk of the Court
Chelan County Superior Court
350 Orondo, 5th Level
Wenatchee, WA 98801

Re: *Borders v. King County, et al.*
Chelan County Superior Court Cause No. 05-2-00027-3

Dear Court Clerk:

I am e-filing the following documents:

1. Letter to Clerk of Chelan County Superior Court;
2. Washington State Democratic Central Committee's Reply in Support of Its Motion in Limine to Exclude Petitioners' Proposed Speculative Attribution of Illegal Votes;
2. Supplemental Declaration of William C. Rava in Support of Washington State Democratic Central Committee's Motion in Limine to Exclude Petitioners' Proposed Speculative Attribution of Illegal Votes;
4. Letter to Judge Bridges regarding Washington State Democratic Central Committee's Motion in Limine to Exclude Petitioners' Proposed Speculative Attribution of Illegal Votes; and
5. Certificate of Service.

[15934-0006/SL051150.109]

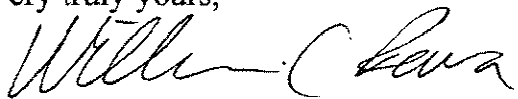
ANCHORAGE • BEIJING • BELLEVUE • BOISE • CHICAGO • DENVER • HONG KONG • LOS ANGELES
MENLO PARK • OLYMPIA • PHOENIX • PORTLAND • SAN FRANCISCO • SEATTLE • WASHINGTON, D.C.

Perkins Coie LLP and Affiliates

April 25, 2005
Page 2

Thank you for your assistance in this matter.

Very truly yours,



William C. Rava

WCR:sw

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

THE HONORABLE JOHN E. BRIDGES
May 2, 2005 at 8:30 a.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CHELAN COUNTY

Timothy Borders et al.,

 Petitioners,

 v.

King County et al.,

 Respondents,

and

Washington State Democratic Central
Committee,

 Intervenor-Respondent.

NO. 05-2-00027-3

WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE'S REPLY IN
SUPPORT OF ITS MOTION IN LIMINE
TO EXCLUDE PETITIONERS'
PROPOSED SPECULATIVE
ATTRIBUTION OF ILLEGAL VOTES

CONTENTS

I.	SUMMARY OF ARGUMENT	1
II.	ARGUMENT AND AUTHORITY	2
A.	Petitioners' Interpretation of Washington Law is Incorrect.....	2
1.	Petitioners Misinterpret and Misstate Washington's Election Contest Statutes.	2
2.	<i>Hill</i> is Binding and Controlling Precedent on the Facts Presented.....	7
3.	Petitioners' Argument that WSDCC Ignored "Adverse" Washington Cases is Without Merit.	10
B.	Petitioners' Discussion of Non-Washington Authorities Provides No Basis for This Court to Change Washington Law.	12
1.	Petitioners' Out of State Cases Do Not Approve of Proportionate Reduction to Reverse An Election and Are Inconsistent With Washington Law.....	12
2.	WSDCC's Out of State Cases Are Consistent With Washington Law.	14
C.	Petitioners' and the Secretary of State's Discussion of "Expert" Evidence Has No Bearing on the Merits of WSDCC's Motion.....	18
1.	If the Court Were to Consider Petitioners' Expert Evidence in the Context of Deciding this Motion, that Evidence is Unreliable.	20
2.	Statistical Evidence from Voting Rights Cases Is <u>Not</u> the Same as Petitioners' Proposed Proportionate Reduction.	21
III.	CONCLUSION.....	23

I. SUMMARY OF ARGUMENT

No Washington court has ever permitted an election contestant to deduct illegal votes from a candidate without proving that the candidate received that vote. The only Washington case that addressed that issue held clearly that the contestant must prove for whom the voter voted. Washington's election contest statutes provide that a contestant alleging illegal votes has not proven his case unless he has shown that those illegal votes changed the election after deducting those given to the winner from the winner's total and those given to the loser from the loser's total. Based on Washington's election contest statutes and case law, WSDCC's Motion in Limine asked the Court to make a pre-trial ruling that Petitioners' proposed method of proof (proportionate reduction)¹ was inadmissible given that it is "antithetical to the law of our State." Motion at 6. The Motion (disclosed April 1 by letter to the Court and filed April 13) had nothing whatsoever to do with Petitioners' experts, whose names Petitioners disclosed to WSDCC for the first time on April 7 and whose expert reports Petitioners filed on April 15.

¹ WSDCC believes that the term "speculative attribution" more accurately captures the nature of Petitioners' proposed mode of proof, although this is a phrase that both Petitioners and the Secretary of State find objectionable. Sec. State. Resp. at 5; Petitioners' Opp. at 4. As WSDCC explained in its Motion, this evidence is speculative because it asks the Court to draw inferences about how an illegal voter voted and apply those inferences to carry the Petitioners' burden of proof, based merely on how geographically nearby legal voters voted. It does nothing to prove whether (to use the first name on Petitioners' list of alleged illegal voters as an example) Cynthia M. voted for Christine Gregoire, Dino Rossi, Ruth Bennett, or some other candidate Ms. M. wrote in on her ballot. Yet Ms. M.'s vote will be deducted from Governor Gregoire's total if enough of her neighbors voted for Ms. Gregoire. This is what WSDCC objects to as speculative. Nonetheless, WSDCC's Motion goes to the substance, not the name, of this rule and is content to refer to it in this Reply as "proportionate reduction" to avoid distracting the Court with pointless disputes over terminology.

2 Much of Petitioners' Opposition is spent touting their experts and the conclusions
3 that they have supposedly reached. As Petitioners point out, however, this Motion is not
4 about the reliability of those conclusions as a matter of social science, but instead whether,
5 *as a matter of law*, Petitioners must present more than probabilities and inferences to
6 overturn the actual count of votes. In Washington, elections are decided by actual voters
7 and votes, not by social science probabilities or inferences from polls or demographics.
8 Most of the rest of Petitioners' Opposition contains their ruminations on the merits of laws
9 of other states, or distorts Washington cases that have no bearing on what an election
10 contestant must show before an illegal vote is deducted from the totals of a winning
11 candidate. Again, these arguments do not change Washington law, or suggest persuasively
12 why this Court should change it. Petitioners' policy arguments decrying the "harms" caused
13 if election contests are difficult to prove and win should be directed to the Legislature which
14 has the exclusive authority under the Constitution to set the rules for election contests, not to
15 this Court which should abide the Supreme Court's admonition that judicial interference in
16 elections is the exception, not the rule. WSDCC's Motion should be granted.

31 **II. ARGUMENT AND AUTHORITY**

33 **A. Petitioners' Interpretation of Washington Law is Incorrect.**

35 **1. Petitioners Misinterpret and Misstate Washington's Election 36 Contest Statutes.**

38 Petitioners present three arguments in opposition to WSDCC's interpretation of
39 Washington's election contest statutes. Petitioners argue (1) that the election contest
40 provision specifically addressed to illegal votes (RCW 29A.68.110) does not address what is
41 acceptable proof is regarding those votes; (2) that the word "appears" in .110 has no
42 meaning unless proportional reduction is the rule of law in Washington; and (3) that it is
43
44
45
46
47

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

contrary to legislative intent to require a contestant to prove which candidate received an illegal vote. All three of these arguments are meritless.

First, as this Court recognized and the statute plainly states, section .110 is a rule of proof. It defines specifically what is to "be shown" by a contestant in order to have illegal votes change a result. Petitioners believe that .110 does not speak to the manner in which an election contestant must prove their case, but instead reflects only their burden of proof. That argument can be disposed of with one citation – to this Court's February 4, 2005 ruling that election contests are subject to the requirements of RCW 29A.68.110. As the Court recognized by incorporation of section .110 into its oral decision, an election cannot be overturned unless

it appears that an amount of illegal votes has been given to the person whose right is being contested, that, if taken from that person, would reduce the number of the person's legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes that may be shown to have been given to the other person.

RCW 29A.68.110; February 18, 2005 Order Denying in Part and Granting In Part Motions of Respondents and Intervenors (attaching Verbatim Report of Proceedings, Court's Oral Decision at 22-23 (February 4, 2005)). The Court immediately followed this citation by referring to *Hill v. Howell*, 70 Wash. 603 (1912), as expressing "*the same requirement. . . . that where there was no evidence to show for whom the elector voted, the vote must be treated between the parties as a legitimate vote.*" *Id.* at 23 (emphases added). Petitioners must prove which candidate received an illegal vote if they plan to deduct it from that candidate's total, and as this Court acknowledged, .110 addresses that requirement.

Second, requiring a contestant to prove "clearly or obviously" which candidate received an illegal vote does not make "appears" in .110 meaningless. Opp. at 12. It does

2 the opposite – it gives that word its accepted meaning and a definition that makes it most
3 consistent with other election contest statutes, particularly RCW 29A.68.050.² The Supreme
4 Court has not relied, exclusively or otherwise, on a particular dictionary to find the meaning
5 of words and also relies on the WEBSTER'S COLLEGE DICTIONARY, the source cited by
6 WSDCC. *Thurston County v. Cooper Point Ass'n.*, 148 Wn.2d 1, 12 (2002) (citing
7 WEBSTER'S). After acknowledging that "obvious" or "evident" is an accepted meaning of
8 "appears" even in their preferred dictionary, Petitioners would rather this Court find the
9 definition of the word "appears" in the election contest statute by looking to the use of the
10 phrase "appearance of impropriety" in unrelated common law. Opp. at 12. This is not how
11 Washington courts interpret election statutes – or any other statutes. *Becker v. County of*
12 *Pierce*, 126 Wn.2d 11, 16 (1995) (regarding election statutes) ("Where the wording of the
13 statute is unambiguous, the meaning is to be derived from the language of the statute
14 alone."); *Dep't of Licensing v. Lax*, 125 Wn.2d 818, 822 (1995) (courts interpret statutes
15 based on the words of that statute).

28 Third, Petitioners cite no evidence of legislative intent to support their argument that
29 "appears" in .110 means "possible." Petitioners invoke but never identify that intent, relying
30 solely on their continued misstatement of the law regarding "liberal construction" of election
31 contest statutes. Opp. at 14-15. Election *contest* statutes, unlike statutes that purport to
32 restrict a citizen's right to vote or impose qualifications for office, are *not* "liberally
33 construed." *Compare Becker*, 126 Wn.2d at 18 (election contest statutes narrowly
34 construed.)

43 ² Even though Petitioners' Opposition at twenty-six pages runs five pages longer than
44 WSDCC's Motion, it does not rebut WSDCC's argument that "appears" is found twice in the election
45 contest statutes, and that "clearly or obviously" is the definition that makes "appears" consistent
46 throughout the chapter. RCW 29A.68.110 ("appears" regarding showing on illegal votes);
47 RCW 29A.68.050 ("appears another person. . . has the highest number of illegal votes").

2 construed) *with Dumas v. Granger*, 137 Wn.2d 268, 284 (1999) (holding that residency
3 requirements for running for office subject to liberal construction).

4
5 Alternatively, Petitioners argue that requiring them to show who received illegal
6 votes would make their proof too cumbersome. But the argument that Washington's election
7 contest statutes and case law make it very difficult for a contestant who does not allege fraud
8 to invalidate a statewide election involving nearly three million votes – based on speculative
9 assertions about who received .0003% of those votes – does not help Petitioners' cause.

10
11 *Dumas*, 137 Wn.2d at 283 (judicial restraint is cardinal principle in election contests).

12
13 Petitioners also ignore the dangerous consequences of a precedent that allows expert
14 testimony to attack an election (even one where no fraud is alleged) as "uncertain," a
15 precedent that would turn every close election into a contestable one. If the Court needs
16 "intent" to guide its decision here, it should look to Washington courts' stated views
17 regarding judicial restraint in election contests, instead of Petitioners' suppositions about the
18 Legislature's unstated views that the contest statutes should be read to conform to the
19 contestant's preferred evidence.
20

21
22 There is no reason to believe that because the use of live testimony will be difficult
23 for Petitioners, that difficulty rewrites .110 and *Hill* to permit something less. In many
24 cases, those difficulties are exaggerated by Petitioners. For example, Petitioners' new-found
25 concerns for the constitutional rights of the alleged illegal voters Petitioners have themselves
26 identified are disingenuous. In King and Pierce County prosecutors have indicated that they
27 do not intend to pursue criminal charges against the purported felon voters that Petitioners
28 identified. *See* Supplemental Declaration of William C. Rava ¶ 2, Ex. A (Mike Carter,
29 *Seattle Times*, "Voter-list purge targets 99 felons "Just the first stage," March 9, 2005 at
30 A1). Moreover, the critical element for criminal prosecution of felon voters is whether the
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

2 alleged felon *knew* that he or she was voting illegally. RCW 29A.84.140 ("A person who
3 knows that he or she does not possess the legal qualifications of a voter and who registers to
4 vote is guilty of a misdemeanor. . . ."). Whether a voter knew she was improperly
5 registered is wholly separate from, and irrelevant to, the question of for whom that voter
6 voted. The Court has the power to limit questioning to the relevant line of inquiry. ER 403.
7
8 Finally, the threat of inaccurate testimony from those voters can be effectively addressed the
9 way it is in every trial – through the rigor of cross-examination.³ *State v. Foster*, 135 Wn.2d
10 441, 456 (1998) ("[C]ross-examination [is] the 'greatest legal engine ever invented for the
11 discovery of truth.'" (quoting *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987)).⁴ Of course,
12 proportionate reduction can produce the exact same result as a voter lying on the stand – by
13 improperly deducting an illegal vote from a candidate who did not receive it. Indeed,
14 because proportionate reduction assumes that every voter who casts a ballot voted for either
15 Governor Gregoire or Mr. Rossi, it is guaranteed to deduct improperly. The only difference
16 is that in proportionate reduction, once the court has adopted and applied the method, there
17 is no way to cross-examine the math.
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36

37
38
39 ³ ER 609, which Petitioners cite at 14, is not a presumption that felons are liars. The Court
40 will observe the witnesses' testimony and will be able to weigh the credibility of those witnesses as it
41 sees fits, just like it does in any other bench trial.
42

43 ⁴ Petitioners' Opposition restates these same arguments (regarding their "inequitable"
44 burden, protecting the Court from unreliable testimony, and the potential for voters to invoke their
45 Fifth Amendment rights) to urge that the *Huggins* case from Arizona should be the rule in
46 Washington. Opp. at 21-22. These arguments are equally unpersuasive when based on other states'
47 common law as they are when based on unidentified Washington legislative intent.

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

2. *Hill* is Binding and Controlling Precedent on the Facts Presented.

Petitioners gamely attempt to brush aside *Hill*, offering a newly fashioned rationale for ignoring the plain and obvious holding of the Court. But despite Petitioners' efforts to cast it as a non-binding precedent, *Hill* is viable and directly applies to this election contest.⁵ *Hill* has been cited five times by the Washington Supreme Court, including both the *Foulkes* and *Gold Bar* cases on which Petitioners rely. Opp. at 17-18. It has never been criticized or distinguished by any reported Washington case or, for good measure, by any case in any other jurisdiction.⁶ It has never been qualified by our courts, or even referred to, as a plurality decision (although the case does contain a three-line concurrence and a six-line dissent). And it is viable precedent for election contest law under the Supreme Court's view of how its own decisions control interpretation of statutes. *In re LaChapelle*, 153 Wn.2d 1, 5 (2004) (for statutory interpretation "once [the Supreme Court has] 'decided an issue of state law, that interpretation is binding until we overrule it'" (internal citation omitted)).

Not only is *Hill* good law, it controls the issue presented by WSDCC's Motion. The definition of *stare decisis* Petitioners draw from a law review article is not the definition used by Washington courts. Opp. at 16. Washington courts consider a case binding

⁵ Much like Petitioners' evolving views on proportionate reduction, Petitioners' briefs over the past three months of this case show their evolving views of *Hill v. Howell*. In January, Petitioners wrote that "[t]o the extent *Hill* requires every contestant alleging illegal votes to show for whom such illegal votes were cast, *Hill* is no longer good law." Petitioners' Opp. to WSDCC's Motion to Dismiss Causes at 26-27 (citing *Foulkes v. Hays*, 85 Wn.2d 629 (1975)). In February, Petitioners asserted that *Hill* was "consistent with the Supreme Court's decision, more than sixty years later, in *Foulkes*." Petitioners' Opp. to WSDCC's Proposed Order at 12. Now, Petitioners suggest yet a third argument, that *Hill* is "not binding precedent" because it is a plurality decision. Opp. at 15.

⁶ The Westlaw KeyCite report of the cases citing to *Hill* has been provided to the Court with this Reply pursuant to LR 5.

precedent under *stare decisis* if "the rule laid down in [the] case is applicable to another case involving identical or *substantially similar* facts." *Greene v. Rothschild*, 68 Wn.2d 1, 8 (1966) (emphasis added). *Hill* easily meets and surpasses that test. Just like in *Hill*, Petitioners attempt to challenge an election by presenting illegal votes, but fail to show which candidate received them. *Hill*, 70 Wash. at 610-11; Opp. at 4-5. And just like in *Hill*, there are no allegations of fraud by the contestant. *Id.* at 610; Petition at 2-3 (describing results as "uncertain" but not alleging fraud).

Hill addresses the mode of proof acceptable in election contests, and our legislature has never seen fit to change RCW 29A.68.110 to qualify or limit *Hill*. The election contest statute regarding illegal votes has remained substantively unchanged since 1881. It has always required the contestant to prove up "illegal votes which may be shown to have been given to ["such" or "the"] other person." CODE 1881 § 3108; REM. CODES & STAT. § 4944 (1915); REM. COMP. STAT. 1922 § 5369 (1922) (identical language in all three iterations of the statute). When Washington's statutes were recodified in 1915, just three years after the *Hill* decision required contestants to prove for whom individual voters voted, the Washington Legislature had an opportunity to amend the law regarding illegal votes to permit alternative proof. They chose not to, and the Legislature's acquiescence supports the argument that *Hill* correctly interpreted election contest statutes by requiring a contestant to prove that a particular candidate received an illegal vote. *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 887 (1982) ("In construing legislation, we presume the legislature is familiar with past judicial interpretations of its enactments.").⁷

⁷ The stability of the election contest statutes before and after *Hill* also discredits the Secretary of State's argument that the words "amount" and "number" in RCW 29A.68.110 and RCW 29A.68.070 refer to "aggregate" figures. Sec. State. Opp. at 4. *Hill* requires an individualized

Petitioners also try to limit the scope of *Hill* by misquoting from it. Petitioners are half right – *Hill* does refer to instances where an entire precinct's vote may be thrown out. Opp. at 16. But what Petitioners fail to say is that immediately following the line they quote, *Hill* explicitly identifies allegations and proof of fraud as a necessary condition for disregarding an entire precinct without proving who received each vote.

Where an election appears to have been fairly and honestly conducted, it will not be invalidated by mere irregularities which are not shown to have affected the result, for, *in the absence of fraud*, the courts are disposed to give effect to elections when possible. And it has even been held that gross irregularities *not amounting to fraud* do not vitiate an election.

Hill, 70 Wash. at 612 (internal citations omitted). Petitioners have not alleged fraud, cannot prove fraud, and so cannot find relief in *Hill*'s discussion of what remedies are available in cases of fraud.

Finally, Petitioners argue that their proportionate reduction rule is as probative as the evidence received in *Hill*. Opp. at 16. This again erroneously assumes that WSDCC's Motion addresses the weight of this evidence – it does not. WSDCC seeks to exclude this evidence because it is a rule of decision that Washington's courts, unlike some of its sister states, have not adopted. *Huggins v. Superior Court*, 163 Ariz. 348, 351 (1990) (referring to proportionate reduction as a "rule"). Regardless, unlike Petitioners' evidence, the proof in *Hill* unquestionably went to whether a specific voter voted for a specific candidate. *Hill*, 70 Wash. at 607-08 (identifying the six voters in question and for which candidate they voted).

showing on the illegal votes before the deduction can take place, and contradicts the notion that a contestant can prove illegal votes in the aggregate. In the 1915 recodification of Washington's statutes the Legislature had an opportunity to change the predecessor to RCW29A.68.110 to allow a more generalized showing in response to *Hill*, but the Legislature chose not to. It is not for this Court, or the parties to this lawsuit, to second-guess that choice.

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
WSDCC's Motion does not seek to exclude all circumstantial evidence, and does not object to evidence that comports with *Hill's* requirement that it show for which candidate a particular voter voted.

3. Petitioners' Argument that WSDCC Ignored "Adverse" Washington Cases is Without Merit.

Quite simply, none of the three Washington cases that Petitioners rely on in their Opposition – *Foulkes*, *Gold Bar*, and *Morgan* – have any bearing on what an election contestant must prove before he can deduct illegal votes from a particular candidate. Opp. at 18-19. Nor do any of these cases explicitly or implicitly limit *Hill*, the case that is dispositive of that question. Petitioners cite *Foulkes* to seek reconsideration of their rejected theory that this Court can order a new election if Petitioners simply show that the number of alleged illegal votes exceeds the margin of victory. Opp. at 17-18. Petitioners cite *Gold Bar* for what it did not hold (that proportionate reduction is acceptable in Washington), not what it did (that a non-resident vote in a local election is an illegal vote). Opp. at 18. And Petitioners cite *Morgan* for its reliance on Kentucky authority that merely says that when a voter votes with a *per se* unlawful ballot, his testimony cannot cure the ballot's illegality. *Id.*

Petitioners' reliance on *Foulkes v. Hays*, 85 Wn.2d 629 (1975) recycles their already rejected contention that the case provides authority for this Court to order a new election if Petitioners show that the number of illegal votes exceeds the margin of victory. Opp. at 18 ("*Foulkes* Court accordingly affirmed a trial court decision ordering a new election where 'it was impossible to tell how many ballots had been fraudulently altered[.]'"). This is the same argument Petitioners made, and lost, when opposing WSDCC's successful motion to strike their request for a new election. *See* Pet. Opp. to Mot. to Strike at 4 ("In 1975, the Supreme Court confirmed that a superior court has the power to order a new election when, due to

neglect by election officials, it was impossible to determine who received the most valid votes.").⁸ It is no more persuasive in its warmed over version. Petitioners' reconstituted remedy argument, in addition to its irrelevance, also fails to grasp the clear delineation in both *Foulkes* and *Hill* between cases that involve fraud, like *Foulkes*, and cases that do not, like *Hill* and this case. In *Foulkes*, as Petitioners' note, there were "fraudulently altered ballots" at issue that had been tampered with during a recount. Opp. at 18; *Foulkes*, 85 Wn.2d at 631, 636. There are no such allegations (much less evidence) in this case. Petitioners want the benefit of alternative remedies and modes of proof available when fraud has been alleged and shown, without the burden of actually proving that any fraud has occurred. *Hill*, 70 Wash. at 612-13 (possible to invalidate an entire precinct vote *if* fraud has been shown); *Foulkes*, 85 Wn.2d. at 636 ("fraudulently altered").

Next, *Gold Bar Citizens for Good Gov't v. Whalen*, 99 Wn.2d 724 (1983) does not "buttress" any aspect of the *Foulkes* decision or contain holdings of its own that bear on whether Petitioners are relieved of their obligation under *Hill* to show for which candidate an alleged illegal voter voted. The Court in *Gold Bar* did reverse the trial Court's motion in limine excluding the contestant's list of illegal voters, but it did so solely because the trial court erred by concluding that non-residents of a municipality are not "illegal" voters when they participate in that municipality's local elections. *Gold Bar*, 99 Wn.2d at 729 ("[R]elated case law and our own independent analysis of the issue would lead us to the

⁸ Elsewhere in their Opposition, Petitioners pile cases from other states on top of *Foulkes* to resurrect this argument. Opp. at 5, n.3. But if the argument is incorrect under Washington law, the possibility that it may be viable in Hawaii or Oklahoma is immaterial. And as WSDCC showed when it briefed and disposed of this argument three months ago, states that give courts power to sanction new elections based on an uncertain result typically do so via statute. WSDCC Reply in Support of Motion to Strike Petitioners' Requested Relief at 5-6, n. 6 (cataloging the statutes of the states that permit the new election remedy).

2 conclusion that votes such as those cast here [by non-residents] are illegal."). There is
3 nothing noteworthy about the fact that *Gold Bar* did not comment on an election contestant's
4 burden to show which candidate received illegal votes – it was not an issue presented by any
5 party and was not before the Court, and the case is of no value in deciding that issue here.
6
7 *In re Electric Lightwave*, 123 Wn.2d 530, 541 (1994) ("We do not rely on cases that fail to
8 specifically raise or decide an issue.").

9
10
11
12 Last, as reflected by Petitioners' charitable assessment that *State ex rel. Morgan v.*
13 *Aalgaard*, 194 Wash. 574 (1938), does not "squarely fit" this contest, little is required to
14 distinguish that case from this one. Opp. at 19. *Morgan* simply holds that in cases where
15 the ballot itself is unlawful – in *Morgan* the ballots contained only one candidate's name
16 printed twice instead of both candidates' names – testimony about for whom the voter
17 intended to vote does not cure the ballot's illegality. Wash. at 582 ("If such absolutely
18 defective and illegal ballots be upheld, the integrity of the ballot and of elections generally
19 will be seriously impaired."). If anything, *Morgan* lends support to WSDCC's Motion
20 because the Court there made an effort to note that in cases that did not involve *per se* illegal
21 ballots, voter testimony would be appropriate. *Id.* ("It is true that in certain cases one who
22 voted at an election may, if he desires to do so, testify concerning his ballot and the person
23 for whom he intended to vote. . . .").

24
25
26
27
28
29
30
31
32
33
34
35
36
37 **B. Petitioners' Discussion of Non-Washington Authorities Provides No**
38 **Basis for This Court to Change Washington Law.**

39
40
41
42
43
44
45
46
47
1. Petitioners' Out of State Cases Do Not Approve of Proportionate
Reduction to Reverse An Election and Are Inconsistent With
Washington Law.

Petitioners want this Court to help them achieve, by importing foreign law to
Washington, what they could not achieve even in those states – application of proportionate

2 reduction to overturn an election. Petitioners deem this distinction "irrelevant," but the
3 courts that have considered that question disagree. Opp. at 22. *Huggins*, the case on which
4 Petitioners now rely so heavily, resisted deciding whether proportionate reduction could be
5 used to overturn elections out of deference to the legislature:
6
7

8 Like the Supreme Court in Alaska, we defer deciding what must be
9 done when proration would change an election result. The law
10 advances incrementally; we address the increment before us; the
11 legislature may wish to consider the subject before we visit it again.
12 For now, we reaffirm [proportionate reduction] approach as a limited
13 screening device.
14
15

16 *Huggins*, 163 Ariz. at 353. Our Legislature, which amended and recodified the election
17 statutes in 1915, three years after *Hill* was decided, did not see fit to change the law
18 regarding illegal votes, even after the Supreme Court had held that an election contestant
19 must show who received those votes. See Part A.2., *supra*.⁹ Even if *Huggins* was the law of
20 this jurisdiction, it could not be used to achieve the end that Petitioners hope to obtain
21 through their proposed proportionate reduction.¹⁰ The same can be said for the other out of
22 state cases Petitioners cite. Motion at 14-15.
23
24
25
26
27
28
29

30 Next, because Petitioners are unable to attack WSDCC's observation that Petitioners'
31 out of state cases do not support application of proportional analysis to overturn an election,
32 Petitioners instead attempt to attack WSDCC itself by mischaracterizing the citation to
33 *Russell v. McDowell*, 83 Cal. 70 (1890) in its Motion. Opp. at 20. But *ad hominem*
34
35
36
37
38
39
40

41
42 ⁹ The Legislature again recodified the election contest statutes in 1977 two years after the
43 *Foulkes* decision, and again made no substantive change to .110 in response to *Foulkes*.
44

45 ¹⁰ Arizona courts have greater flexibility than those in Washington because Arizona's
46 election contests statutes are silent on the acceptable mode of proof regarding illegal votes. Motion
47 at 13.

arguments are rarely persuasive and, in any event, Petitioners' accusation is incorrect; WSDCC attributed its quote from *Russell* to the party in interest, not the Court. Motion at 15 (attributing argument to petitioner in that case). Moreover, WSDCC accurately referred to *Russell* to illustrate that Petitioners' proportionate reduction cases are not cases where that rule was used to overturn the election. *Id.* at 14 ("[P]roportional attribution of illegal votes evidence is used for very limited purposes, and has not served as the basis for overturning an election[.]"). As *Russell*'s plain application of the proportional reduction rule shows, performed by the court not an expert, the result in that case remain unchanged. *Russell*, 83 Cal. at 72 (winner by margin of 170 vote before proportionate reduction won by 164 votes after proportionate reduction).¹¹

2. WSDCC's Out of State Cases Are Consistent With Washington Law.

Petitioners do not address or rebut the argument that there is disparate treatment of proportionate reduction among the states, which was the primary and stated basis for WSDCC's citation to those out of state cases. Motion at 12. Rather, they argue that the

¹¹ Relying on the similarity between election contest statutes in Washington and California, Petitioners contend that California's interpretation of its statutes controls this Court's interpretation of Washington statutes. A close look at the case history of *Russell* further demonstrates why that case should have no bearing here. *Russell* was published twenty-two years before *Hill* was decided and was available as persuasive precedent at that time. Careful reading of the *Hill* Court's use of precedent suggests very strongly that it was aware of *Russell* and did not find it persuasive or applicable. The *Hill* opinion quoted California authority, *Packwood v. Brownell*, 121 Cal. 478, 479 (1898), to support its conclusion that certain precinct results should not be disregarded simply because poll workers were temporarily absent. *Hill* at 612. The very next sentence from the *Packwood* opinion, however, cites to *Russell v. McDowell* for that case's treatment of illegal votes – the very issue presented in *Hill*. *Packwood*, 121 Cal. at 479-80 (citing *Russell*, 83 Cal. at 79). But *Russell* is not relied on or discussed by the *Hill* Court. This selective use of precedent, confirmed by the holding in *Hill* regarding proof from individual voters that is at odds with *Russell*, indicates that the *Hill* Court adopted California law that it considered consistent with Washington law and disregarded California law that was not.

2 Supreme Court cases of other states that reject proportionality fall on the wrong side of an
3 invented divide between "old" cases and "modern" cases purportedly decided in today's
4 golden age of statistical enlightenment. Opp. at 22. Petitioners are wrong as a matter of
5 history, they are incorrect in their characterization of proportionate reduction as an expert
6 insight, and they fail to even address the cases cited by WSDCC most on point and most
7 consistent with Washington law.
8
9
10
11

12 The assertion that proportionate reduction is the "modern rule" is wrong.
13
14 Proportionate reduction is a rule of decision that has existed for over 135 years, and had
15 been adopted in some states' courts well before 1912 when Washington's Supreme Court in
16 *Hill* chose a different path. Commentators acknowledged the existence of proportionate
17 reduction sixty years ago, and its origin can be traced back to 1868. J.B.G., *Treatment of*
18 *Excess or Illegal Ballots When it is Not Known For Which Candidate or on Which Side of a*
19 *Proposition they Were Cast*, 155 A.L.R. 677 (1945) ("An early Michigan case (*People ex*
20 *rel. Williams v. Cicott*, 16 Mich. 283 (1868)) has frequently been cited in support of the
21 proportionate reduction rule as applied to situations where the number of illegal votes
22 exceeds the majority of the candidate who has emerged victor on the basis of the total count
23 of both legal and illegal votes.").
24
25
26
27
28
29
30
31
32
33

34 As evidenced by every proportionate reduction case that Petitioners cite, courts or
35 election officials, not experts, apply this rule in the jurisdictions where it is accepted. *See*
36 Part C, n. 15, *infra*. Although Petitioners question whether this Court's judicial forbears in
37 *Hill* had the mathematical tools needed to apply the rule of proportionate reduction, as
38 Petitioners note courts long before *Hill* have been able to conquer its complexity
39 (multiplication and subtraction) without help from a contestant's retained expert. Opp. at 20
40 (Petitioners citing cases from 1890 and 1894 that used proportionate reduction without
41
42
43
44
45
46
47

expert testimony or any statistical evidence). Even in the so-called "modern" age, courts from *Huggins* in 1990 to *Qualkinbush* in 2005 perform proportionate reduction themselves, not through the use of expert testimony or statistical evidence. *Qualkinbush*, 2005 WL 736524 at **22; *Huggins*, 163 Ariz. at 354.¹²

Petitioners attempt to distinguish *Delaware ex rel. Wahl v. Richard*, 44 Del. 566 (1949) and *Wilkinson v. McGill*, 192 Md. 387 (1949) by incorrectly arguing that neither case rejected proportionate reduction. Opp. at 23-24. But, much like they do with Washington authority, Petitioners must selectively quote those cases to create that false impression.

Petitioners state that *Wahl*'s statement regarding proportionality is *dictum*, because they contend "no illegal ballots" were cast in that case. Opp. at 23. This is not true. There were 101 disputed ballots at issue in *Wahl* that had not been properly processed by election officials, but were intermingled in the entire pool of ballots before the irregularity had been identified. *Id.* at 577. The Court in *Wahl* clearly decided that those ballots were illegal. *Id.* at 579 ("The 101 ballots in envelopes not signed by both clerks, when voted, *were illegal and should have been rejected* by the election officers in making the count.") (emphasis added). What the *Wahl* Court refused to do, which is precisely what Petitioners' ask for here, is to allow the contestant to rely simply on the illegality of those votes to employ proportionate reduction and take away votes from the candidates. *Id.* at 579 (noting that the rule is improper because "here fraud is neither alleged or proven"). In *Wahl*, because "there

¹² Reflecting their *laissez faire* approach to arguments about proportionate reduction generally, see n.16, *infra*, Petitioners sometimes say that proportionate reduction is proper because it is old, and sometimes say that that it is proper because it is new. Compare Opp. at 25 ("Of course, pro rata deduction is not a new concept in American election law.") with Opp. at 24 ("Petitioners can also cite treatises, but from the twenty-first century, supporting proportional deduction in the instant situation."). WSDCC respectfully submits that proportionate reduction's applicability should be judged by its consistency with Washington law, not its vintage.

2 was no allegation of fraud," the Court chose to disregard the illegality rather than apply
3 proportionate reduction to arbitrarily deduct those votes. *Id.*

4
5 Petitioners also posit that *Wilkinson* is not Maryland's rejection of the proportionate
6 reduction rule. Opp. at 23-24. Maryland's highest court disagrees. Relying heavily on
7
8 *Wilkinson*, Maryland once again rejected proportionate reduction in *Pelagatti v. Bd. of*
9
10 *Supervisors of Elections for Calvert County*, 343 Md. 425, 442-43 (1995) ("In rejecting
11
12 McNulty's argument [that votes could be deducted based on probability], this Court
13
14 discussed *Wilkinson v. McGill*, *supra*, and reiterated than an election would not be set aside
15
16 based on the argument that 'there is a probability that the illegal votes were cast for the side
17
18 having the majority.' . . . this Court went on to reject a test based upon '*what the Court*
19
20 *guesses*' would have happened but for the illegality.") (emphasis in original).

21
22 Finally, Petitioners dismiss without any analysis the two cases most closely on point
23
24 that reject proportionality – *Jaycox v. Varnum*, 226 P. 285 (Idaho 1924) and *State ex rel.*
25
26 *Boerner*, 174 Neb. 689 (1963). Opp. at 24-25. Petitioners blithely cast these cases aside
27
28 with the preposterous claim that they do not contain "reasoning." *Id.* at 26, n.18. These
29
30 cases contain reasoning that is consistent with Washington law and these cases undermine
31
32 Petitioners' position that a guess about how specific voters voted, cloaked in the rubric of
33
34 statistics, can be used as the sole basis to overturn an election. Both *Jaycox* and *Boerner*
35
36 reject proportionate reduction with reasoning that mirrors the reasoning in *Hill* that an
37
38 election contestant must show which candidate received illegal votes and the court should
39
40 not entertain assumptions to carry that burden when the contestant cannot carry it himself.
41
42 *Boerner*, 174 Neb. at 695 ("The general rule is that a party who wishes to dispute an election
43
44 upon the basis that illegal votes were cast has the burden of proving for which candidate the
45
46 illegal votes were cast."); *Jaycox*, 226 P. at 289 ("[I]t would seem incumbent on appellant to
47

2
3 prove not only illegal votes, but also for whom they were cast."); *Hill*, 70 Wash. at 610 ("If
4 this was an illegal vote, it was proper to show for whom the elector voted[.]").

5 Rather than address the reasoning of these cases head on, Petitioners discredit the
6 treatise that those courts cite, Halbert Paine's TREATISE ON THE LAW OF ELECTIONS TO
7 PUBLIC OFFICES (1890).¹³ Opp. at 24-25. But Petitioners cannot avoid what is true about
8 *Jaycox*, *Boerner*, and any other case that cites persuasive authority – they are nonetheless
9 valid decisions rendered by those courts and represent rules of law, not merely extra-judicial
10 commentary on the merits of the authority cited.
11

12
13
14
15
16
17 **C. Petitioners' and the Secretary of State's Discussion of "Expert" Evidence**
18 **Has No Bearing on the Merits of WSDCC's Motion.**
19

20 Given that Petitioners did not disclose their social science expert reports until after
21 WSDCC filed its Motion and that, accordingly, WSDCC's Motion did not assert any
22 objections to Petitioners' expert reports, it is absurd that Petitioners devote pages of their
23 Opposition to explain that "WSDCC's Objections to Katz and Gill Lack Merit."¹⁴ Opp. at 7.
24 The Secretary of State also speculates about "the Democrats' objection" to expert testimony
25 about which WSDCC was not aware as of the filing of the Motion. Sec. State Resp. at 6. In
26 any event, WSDCC's objection goes to the admissibility, not the weight, of proportionate
27 reduction.
28

29 Proportionate reduction is not used in reported election contests as an intricate
30 mathematical scheme requiring expert testimony to explain and execute; it is a rule of legal
31

32
33
34
35
36
37
38
39
40
41
42
43 ¹³ Petitioners neglect to explain why 1890 reasoning in *Russell*, a California decision that no
44 Washington court has ever cited, has more force than 1890 reasoning from Paine, a treatise that the
45 Washington Supreme Court has cited four times. See WSDCC's Motion at 19 (citing cases).
46

47 ¹⁴ Petitioners' experts are political science Professors Anthony Gill and Jonathan Katz.

2 decision that some jurisdictions accept and others, like Washington, do not. In *every*
3 proportionate reduction case cited by Petitioners, the judge or the relevant election official
4 performed the math without the aid of "expert" testimony.¹⁵ These courts often refer to this
5 process as simply the application of a legal rule. Although Petitioners assert in conclusory
6 fashion that expert testimony may be required here because proportionate reduction is
7 beyond the expertise of a lay witness, Petitioners' Opp. at 6, the courts have historically used
8 their own expertise to perform the deductions in those jurisdictions where proportionate
9 reduction is permitted as a matter of law. Petitioners' categorization of proportionate
10 reduction as "expert" testimony is little more than an attempt to place a gloss of
11 admissibility on the theory, and is a label that neither Petitioners' own cases nor the language
12 of ER 702 supports. Petitioners' experts acknowledge that they are merely making
13 assumptions based on probabilities, which is why in jurisdictions that permit proportionate
14 reduction an expert's opinion is not necessary.
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

32
33
34 ¹⁵ See *Qualkinbush v. Skubisz*, 2005 WL 736524 at **22 (Ill.App.Ct. 2005) (first describing
35 apportionment as "remedy" and "procedure" and then affirming "the trial court's method of
36 deduction"); *In re Durkin*, 700 N.E.2d 1089, 1094-94 (1998) (court using proportionate reductions
37 provided by canvassing board); *Huggins*, 163 Ariz. at 354 (referring thirteen times to apportionment
38 of illegal votes as application of "rule," before attaching an appendix identifying court's own
39 deduction from candidates' totals); *Finkelstein v. Stout*, 774 P.2d 786, 792 (1989) (application of
40 proportionate reduction to be performed by "Director [of elections]" on remand); *Grounds v. Lawe*,
41 67 Ariz. 176, 179 (1948) (identifying trial court's deduction of votes as "application of [a] rule.");
42 *Appeal of Harner*, 62 Pa. D&C 56, 59 (1948) (votes deducted by "the board"); *Flowers v. Kellar*,
43 322 Ill. 265, 269-270 (1926) (court performing proportionate reduction to subtract 3.92 and 4.08
44 votes from the parties respectively); *Briggs v. Ghrist*, 134 N.W. 321, 324 (1912) ("trial court would
45 have been justified in deducting the illegal vote pro rata"); *Russell*, 83 Cal. at 72 ("superior court"
46 deducted the votes); *Ellis v. May*, 99 Mich. 538, 557 (1894) ("the mode of apportionment laid down
47 by the court below").

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

1. If the Court Were to Consider Petitioners' Expert Evidence in the Context of Deciding this Motion, that Evidence is Unreliable.¹⁶

Nonetheless, the Court should not assume the reliability of what Petitioners' experts have said, much less accept the lawyers' seriously distorted version of what the experts have said. Petitioners filed the expert reports on April 15, and it was not until Saturday, April 23 that Petitioners provided the datasets used by these experts. Without adequate time to review the data, it was impossible for WSDCC to obtain expert analysis in time for filing this brief.

Petitioners' experts are pointedly careful not to vouch for the accuracy, completeness, or even representativeness of the data they received. In fact, Petitioners have candidly conceded that they looked for problems primarily in areas that supported the Governor.

Compare Declaration of William C. Rava in Support of WSDCC's Opposition to Petitioners'

¹⁶ Petitioners have had a conveniently wide array of views, which they change to fit whatever argument is needed at the time, regarding whether the outcome of the 2004 election can be determined with certainty and the propriety of proportionate reduction to reach a certain result. On January 7, when they hoped that simply attacking the election as generally problematic would lead to a new election, Petitioners said that the "true result of the election [is] uncertain and *likely unknowable*. . . . *Because the true results cannot be ascertained, a new election must occur promptly*." Petition at 2-3 (emphasis added). On January 26, when they wrote that proportionate reduction is based too greatly on an "element of chance," Petitioners continued to maintain that the Court should simply scrap the election rather than deduct illegal votes in proportion to legal ones. Petitioners' Memo. in Opp. to WSDCC's Mot. to Dismiss Causes at 26. On February 16, once their remedy request had been rejected, Petitioners discovered a new respect for proportionate reduction as a way to predict the outcome of the 2004 election, although even then they did not ascribe much certainty to the result it could produce. Petitioners' Resp. to WSDCC's Prop. Order at 17 ("courts accept circumstantial evidence (including evidence of the proportions in which votes in the affected precincts were cast for each candidate) that the problematic ballots *likely* affected the outcome") (emphasis added). Now, when Petitioners believe that proportionate reduction is needed to "present their case," that rule is suddenly the way to do it "most accurately" and will "clearly indicate" for the Court who won the election. Opp. at 5-6. The Court should view Petitioners' arguments in light of their shifting positions – in just three months the results of this election according to Petitioners have gone from "unknowable" to a result that can be "clearly indicated."

2 Motion in Limine to Exclude Evidence Concerning Previously Rejected Ballots and Other
3 "Offsetting Errors" ¶ 11, Ex. H (David Postman, *Seattle Times*, "Democrats search for errors
4 in GOP land," April 18, 2005 at 2 (quoting Dino Rossi's attorney as stating "In any court
5 case, you present the evidence that favors you...There's no obligation in court to present all
6 the evidence that helps or hurts you.") *with* Petitioners' Opp. at 2, 3 ("Petitioners had until
7 April 15, 2005, to disclose *all* illegal votes and errors") ("if *the* illegal votes are
8 apportioned") (emphases added). No conclusion about what would have happened in the
9 real world can be reached without knowing that the data examined by Petitioners' experts is
10 an accurate census of illegal votes. The experts do not purport to be able to say, as
11 Petitioners claim, that even the illegal votes selected by Petitioners were representative of
12 their precincts or that their conclusions will "clearly indicate" that "Mr. Rossi received more
13 legal votes than Ms. Gregoire." *Compare* Petitioners' Opp. at 6 (the expert evidence "will
14 clearly indicate that Mr. Rossi received more legal votes than Ms. Gregoire") *with* Gill
15 Report at 1 ("may have resulted in a victory [for Rossi]"), 10, 12 ("could have affected the
16 election outcome").

30
31 **2. Statistical Evidence from Voting Rights Cases Is Not the Same as**
32 **Petitioners' Proposed Proportionate Reduction.**
33

34 As to the methodology used by the experts, it is not in fact the same methodology
35 used in voting rights cases or the academic community, and – as the Court can tell from
36 reading the cases cited by Petitioners – experts have not been used in the election contest
37 cases where the court or the legislature have adopted the proportionate reduction rule as a
38 matter of law. Nor is there support for Petitioners' claim that the manual recount was less
39 accurate than earlier counts or the outrageous statement that the "academic literature
40 indicates [felons] strongly favor the WSDCC." The article referenced by Petitioners'
41
42
43
44
45
46
47

2 experts, Opp. at 14,¹⁷ does not say that; did not study how ex-felons actually vote; did not
3 study Washington, much less the WSDCC; and does not purport to predict how ex-felons
4 would react to a woman candidate who was the state's top law enforcement officer for
5 twelve years and who defeated in the primary a minority male from King County and a
6 white male in the general election.¹⁸

7
8
9
10 Similarly, the voting rights cases (and every case Petitioners cite to support their
11 proposed statistical evidence is a voting rights case, not an election contest) regarding
12 racially polarized voting are not applicable. Unlike here where the election contest statutes
13 and cases bar Petitioners' evidence, in the voting rights cases evidence of racial polarization
14 is specifically approved by the governing statute and interpretive authority. *See Thornburg*
15 *v. Gingles*, 478 U.S. 30, 36-37 (1986) (permitting evidence of claim for violation of § 2 of
16 the Voting Rights Act under the "totality of circumstances" test set forth in § 2, including
17 whether "voting in the elections of the state or political subdivision is racially polarized").¹⁹
18 Similarly, the methodology used in those voting rights cases is, by design, intended only to
19 reach general conclusions regarding a correlation between race and whether a voter might
20
21
22
23
24
25
26
27
28
29
30
31

32
33
34 ¹⁷ The article is Christopher Uggen & Jeff Manza, *Democratic Contraction? Political*
35 *Consequences of Felon Disenfranchisement in the United States*, 67 Am. Sociological Rev. 777
36 (2002).

37
38 ¹⁸ If the Court agrees that proportionate reduction is subject to scrutiny under the standards
39 of ER 702, WSDCC will fully brief the unreliability of Petitioners' expert reports after deposing
40 those experts. WSDCC's brief discussion of their conclusions here is for purposes of reply to the
41 arguments in Petitioners' Opposition regarding WSDCC's unstated "objections" and does not
42 represent a motion to disqualify the testimony of Drs. Katz and Gill.

43
44 ¹⁹ Statistical evidence of racially polarized voting was just one of six factors the Court
45 considered in assessing the validity of the claim in *Thornburg*. 478 U.S. at 39-41 (identifying six
46 factors). Here, Petitioners' proposed proportionality evidence is the only proof they intend to proffer
47 to show how the allegedly illegal voters cast their ballots.

2 vote for a candidate of the same race. *Reed v. Town of Babylon*, 914 F.Supp. 843, 851
3 (1996) ("statistical methodologies. . . . used to *estimate voter behavior*") (emphasis added).
4 Here, Petitioners are attempting to use statistical evidence to determine for which candidate
5 each alleged illegal voter voted – a goal not attempted or achieved by statistical evidence in
6 the voting rights cases. These cases are inapposite. They do not support the proposition for
7 which they are cited, even in the voting rights context. Perhaps more importantly, no
8 Washington court has ever embraced such evidence in an election contest case and this case,
9 in this Court, is a singularly *inappropriate* vehicle for such an extension of Washington law.
10
11
12
13
14
15
16

17 III. CONCLUSION

18 Speculative attribution, by any name, is not the rule of law in Washington. For the
19 reasons set forth above and those in WSDCC's moving papers, the WSDCC respectfully
20 submits that the Court should grant the Motion.
21
22
23
24

25 DATED: April 25, 2005.
26
27
28

29 PERKINS COIE LLP

30 By /s/Kevin J. Hamilton
31 Kevin J. Hamilton, WSBA # 15648
32 William C. Rava, WSBA # 29948
33 1201 Third Avenue, Suite 4800
34 Seattle, WA 98101-3099
35
36
37
38

39 Attorneys for Intervenor-Respondent
40 Washington State Democratic Central
41 Committee
42
43
44
45
46
47

SPEIDEL LAW FIRM

Russell J. Speidel, WSBA # 12838
7 North Wenatchee Avenue, Suite 600
Wenatchee, WA 98807

JENNY A. DURKAN

Jenny A. Durkan, WSBA # 15751
c/o Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

THE HONORABLE JOHN E. BRIDGES

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CHELAN COUNTY

Timothy Borders et al.,

Petitioners,

v.

King County et al.,

Respondents,

and

Washington State Democratic Central
Committee,

Intervenor-Respondent.

NO. 05-2-00027-3

SUPPLEMENTAL DECLARATION OF
WILLIAM C. RAVA IN SUPPORT OF
WSDCC'S MOTION IN LIMINE TO
EXCLUDE PETITIONERS' PROPOSED
SPECULATIVE ATTRIBUTION OF
ILLEGAL VOTES

I, WILLIAM C. RAVA, state and declare as follows:

1. I am one of the attorneys representing Intervenor-Respondent Washington
State Democratic Central Committee ("WSDCC") in this litigation. I am over the age of 18,

SUPPLEMENTAL DECLARATION OF WILLIAM C.
RAVA IN SUPPORT OF WSDCC'S MOTION IN
LIMINE TO EXCLUDE PETITIONERS' PROPOSED
SPECULATIVE ATTRIBUTION OF ILLEGAL
VOTES - 1

[15934-0006-000000/SL051150.122]

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

1 am competent to testify, and make this declaration based on my personal knowledge and the
2 files and records in this matter.
3

4
5 2. Attached to this declaration as Exhibit A is a true and correct copy of a article
6 titled Mike Carter, *Seattle Times*, "Voter-list purge targets 99 felons 'Just the first stage,'"
7 March 9, 2005.
8
9

10 SIGNED and DATED at Seattle, Washington this 25th day of April, 2005
11
12
13

14 s/ William C. Rava

15 WILLIAM C. RAVA
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

SUPPLEMENTAL DECLARATION OF WILLIAM C.
RAVA IN SUPPORT OF WSDCC'S MOTION IN
LIMINE TO EXCLUDE PETITIONERS' PROPOSED
SPECULATIVE ATTRIBUTION OF ILLEGAL
VOTES - 2

[15934-0006-000000/SL051150.122]

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

EXHIBIT A

Westlaw.

NewsRoom

3/9/05 STLTI A1

Page 1

3/9/05 Seattle Times A1
2005 WLNK 3679456

Seattle Times (WA)
Copyright (c) 2005 Seattle Times Company, All Rights Reserved.

March 9, 2005

Section: ROP News

Voter-list purge targets 99 felons 'Just the first stage'
King County prosecutors to focus on GOP's tally of 800 possible felon voters

Mike Carter; Seattle Times staff reporter

King County prosecutors are moving to revoke the voter registrations of 99 convicted felons who are believed to have cast illegal votes in the 2004 general election.

The action, announced by Prosecutor Norm Maleng at a news conference yesterday, is the first in a series of purges designed to scrub the voter rolls of felons who shouldn't have been on them in the first place.

Maleng said prosecutors will now focus on more than 800 possible felon voters identified by the state Republican Party. The party says it has found more than 1,100 felons who voted illegally statewide as it searches for possible illegal votes in an effort to have the election of Democratic Gov. Christine Gregoire overturned.

"This is just the first stage of a process that will continue as we receive and investigate allegations of felons who remain on our voter rolls," Maleng said.

Maleng said the 99 names were among 105 given to election officials by The Seattle Times. A Times investigation published in January concluded that at least 129 convicted felons in King and Pierce counties had cast illegal ballots.

Before publishing, the Times provided a larger list to election officials in both counties, who helped confirm the findings. Some of the names on that list were ultimately excluded from the Times' tally because of doubts about whether a good match existed between voters and felons with the same names and birthdates.

Maleng stressed yesterday that while the felons will be removed from the registration rolls, it is unlikely that any of them will be prosecuted. In order to prosecute, the county would have to prove a felon knew he was breaking the law by casting a vote.

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Pierce County has removed 73 felons from its voter-registration list but, like King County, has no plans to prosecute.

Removing felons' names from the registration rolls will not nullify those votes.

The issue of illegal votes is central to a lawsuit filed by the Republican Party seeking to overturn Gregoire's election. After three statewide vote counts, Gregoire was declared the winner over Republican candidate Dino Rossi by 129 votes. The GOP contends that there were enough illegal votes cast — in addition to errors made by election workers — to nullify the election and force a new vote.

Of the 105 names referred to Maleng's office by King County election officials, prosecutors determined four had legally had their voting rights restored. One had a misdemeanor in King County, and prosecutors were attempting to verify a felony in California. A sixth involved a voter whose son had the same name and had been removed from the rolls after a felony conviction, Maleng said.

Maleng said yesterday that his office had sent letters to the last known addresses of the 99 felons, telling them to appear at a hearing March 18 if they intended to challenge their removal from the registration rolls.

One of the felons on The Times' list was Paul Scott Walker, who was convicted and sent to prison for possession of methamphetamine in 2001. Walker, who voted for Rossi, said yesterday he assumed his rights were restored after he served his sentence, and he plans to challenge the county's effort to remove him from the voter rolls.

"They don't tell you anything about those rights. I never knew it was a permanent situation," the 38-year-old Seattle resident said. "I did my time and I think I should be able to come back to society."

Maleng and County Executive Ron Sims both acknowledged — but did not elaborate on — flaws in the system that allowed the felons to either remain on voter rolls or register after their convictions.

Citizens convicted of felonies are automatically stripped of their right to vote. They can petition the court to have the right restored providing they have completed their prison sentence and have paid all of their fines and restitution.

Courts are supposed to notify county election offices of every felony conviction. The election offices, however, have had a hard time matching those names to voter rolls, and often a felon's name is not removed from the voter registration roll. In some instances, felons re-register and county election officials say they don't have the resources to run criminal background checks on every new voter.

In addition, the lack of a reliable statewide system for tracking felons has made it hard for election officials in one county to know if a voter has a conviction in another county. Maleng said that issue is being addressed at the state level.

3/9/05 STLTI A1

Page 3

Sims pointed out that the county purged 600 felons from its list of more than 1 million registered voters before the election. However, Dan Satterberg, Maleng's chief of staff, acknowledged that is just a fraction of the thousands of felons convicted in King County every year.

Satterberg said there is no mechanism in the court system to positively notify felons that they have lost their voting rights.

He contrasted that with the way felons are stripped of their right to own guns. When they are convicted, they sign a document saying they understand they can't own a firearm. If they're ever caught with one, then it is easy to prove they broke the law.

"But there's nothing like that with voting rights now," he said. "That may be one of the reforms you'll be seeing."

Mike Carter: 206-464-3706 or mcarter@seattletimes.com

Prosecutor Norm Maleng foresees ongoing process. (_Ident_1)

---- INDEX REFERENCES ----

NEWS SUBJECT: (Government (1GO80); World Elections (1WO93); Political Parties (1PO73); Global Politics (1GL73); Public Affairs (1PU31))

REGION: (USA (1US73); Americas (1AM92); North America (1NO39))

Language: EN

OTHER INDEXING: (DEMOCRATIC GOV; GOP; TIMES) (Christine Gregoire; Citizens; Dan Satterberg; Gregoire; Ident; Maleng; Mike Carter; Norm Maleng; Party; Paul Scott Walker; Prosecutor Norm Maleng; Republican Party; Satterberg; Sims; Walker)

EDITION: Fourth

Word Count: 1089

3/9/05 STLTI A1

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.



William C. Rava
PHONE: 206.359.6338
FAX: 206.359.7338
EMAIL: wra@perkinscoie.com

1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
PHONE: 206.359.8000
FAX: 206.359.9000
www.perkinscoie.com

April 25, 2005

Via Electronic Delivery

The Honorable John E. Bridges
Chelan County Superior Court
Department No. 3
401 Washington Street
Wenatchee, WA 98807

Re: *Borders v. King County, et al.*
Chelan County Superior Court Cause No. 05-2-00027-3

Dear Judge Bridges:

Pursuant to LR 5(d)(5), enclosed with this letter are copies of non-Washington authority referred to in the Reply in Support of Washington State Democratic Central Committee's Motion in Limine to Exclude Petitioners' Proposed Speculative Attribution of Illegal Votes, filed today.

Yours truly,

A handwritten signature in black ink, appearing to read "William C. Rava".

William C. Rava

cc: All parties and counsel of record

WCR:ccs

Enclosures

[/DOCUMENT.011.DOC]

ANCHORAGE · BEIJING · BELLEVUE · BOISE · CHICAGO · DENVER · HONG KONG · LOS ANGELES
MENLO PARK · OLYMPIA · PHOENIX · PORTLAND · SAN FRANCISCO · SEATTLE · WASHINGTON, D.C.

Perkins Coie LLP and Affiliates

KEYCITE

CHill v. Howell, 70 Wash. 603, 127 P. 211 (Wash., Oct 26, 1912)

Citing References**Positive Cases (U.S.A.)****★★ Cited**

- 1 Foulkes v. Hays, 537 P.2d 777, 780+, 85 Wash.2d 629, 633+ (Wash. Jul 10, 1975) (NO. 43688)
- 2 In re Sugar Creek Local School Dist., 185 N.E.2d 809, 819, 90 Ohio Law Abs. 257, 257, 21 O.O.2d 16, 16 (Ohio Com.Pl. Mar 22, 1962) (NO. 18090)

★ Mentioned

- 3 Gold Bar Citizens for Good Government v. Whalen, 665 P.2d 393, 397, 99 Wash.2d 724, 729 (Wash. Jun 09, 1983) (NO. 48803-7)
- 4 Vickers v. Schultz, 81 P.2d 808, 809, 195 Wash. 651, 655 (Wash. Aug 04, 1938) (NO. 27141)
- 5 Hillier v. Public Utility Dist. No. 3, 63 P.2d 392, 395, 188 Wash. 602, 609 (Wash. Dec 16, 1936) (NO. 26249)
- 6 Rands v. Clarke County, 139 P. 1090, 1093, 79 Wash. 152, 159 (Wash. Apr 15, 1914)
- 7 Beauregard v. Gunnison City, 160 P. 815, 819, 48 Utah 515, 515 (Utah Oct 16, 1916) (NO. 2897)

Secondary Sources (U.S.A.)

- 8 Propriety of test or question asked applicant for registration as voter other than formal questions relating to specific conditions of his right to registration, 76 A.L.R. 1238, § 1238+ (2004)

Court Documents**Appellate Court Documents (U.S.A.)****Appellate Briefs**

- 9 Jimenez v. Naff, 1970 WL 122634, *122634+ (Appellate Brief) (U.S. Aug 12, 1970) **Appellants' Brief on the Merits** (NO. 115) ★★

Court of Appeals of Maryland.
Thomas M. PELAGATTI

v.

BOARD OF SUPERVISORS OF ELECTIONS FOR
CALVERT COUNTY et al.
No. 134, Sept. Term, 1994.

Jan. 10, 1995.
Opinion issued
Sept. 9, 1996.

Unsuccessful candidate for state House of Delegates brought action to contest election on grounds that absentee ballots were invalid. The Circuit Court, Calvert County, denied relief, and candidate noted appeal. On issuance of writ of certiorari, the Court of Appeals, Eldridge, J., held that: (1) petition was not authorized under statute relied upon by candidate, and (2) even if some absentee ballots were illegal because they were not accompanied by ballot applications, candidate failed to demonstrate that alleged illegality altered outcome of election.

Affirmed.

West Headnotes

[1] Elections 269

144k269 Most Cited Cases

Petition filed by unsuccessful candidate for state House of Delegates to disqualify certain absentee ballots or hold new election was not authorized by statute allowing registered voter to seek judicial relief for acts or omissions relating to election that are inconsistent with state election law, as that statute only provided remedy where no other timely and adequate remedy was provided, and separate statute provided for judicial review of action by candidate or absentee voter contesting validity of ballots. Code 1957, Art. 33, § 19-2, 27-10.

[2] Elections 227(8)

144k227(8) Most Cited Cases

Unnecessary disenfranchisement of voters due to minor errors or irregularities in casting their ballots, in absence of fraud, should be avoided.

[3] Elections 227(8)

144k227(8) Most Cited Cases

[3] Elections 291

144k291 Most Cited Cases

General principle that irregularities will not invalidate ballots or elections does not apply when election officials violate preemptory requirement designed to safeguard integrity of elections, neglect of which presents apparent opportunity for fraud, but burden of showing that action of supervisors of elections has been clearly illegal is not light.

[4] Elections 227(8)

144k227(8) Most Cited Cases

To invalidate or change results of election on grounds that certain absentee ballots violated statutory requirements, challenger must demonstrate that illegality altered outcome of election.

[5] Elections 291

144k291 Most Cited Cases

In determining whether invalid ballots affected outcome of election, courts will not guess, speculate, or resort to probability as to which candidate or which side of issue invalid ballots favored; instead, party challenging election results has burden of proving that illegality changed outcome of election.

[6] Elections 295(2)

144k295(2) Most Cited Cases

Unsuccessful candidate for state House of Delegates was not entitled to have certain number of absentee ballots disqualified, or to new election, on grounds that those ballots were not accompanied by application for absentee ballot, even if such ballots were illegal; candidate failed to establish that high percentage of absentee ballots were cast for successful candidate, and court would not speculate as to how those votes were cast, so candidate failed to demonstrate that alleged illegality altered outcome of election. Code 1957, Art. 33, § 27-4.

****237 *427** Brent E. Walthall (Kevin C. Gale, on brief), Upper Marlboro, for Appellant.

Jack Schwartz, Asst. Atty. Gen. (J. Joseph Curran, Jr., Atty. Gen. and Mary O. Lunden, Asst. Atty. Gen., all on brief), Baltimore, Stephen V. Wehner (Wehner & York, Washington, DC; Robert Crum, Prince Frederick, argued and on brief), for Appellees.

****238** Argued before MURPHY, C.J., and ELDRIDGE, RODOWSKY, CHASANOW,

KARWACKI, BELL and RAKER, JJ.

ORDER

PER CURIAM.

For reasons to be stated in an opinion later to be filed, it is this 10th day of January, 1995

ORDERED, by the Court of Appeals of Maryland, that the judgment of the Circuit Court for Calvert County in favor of Anthony J. O'Donnell as the duly elected member of the Maryland House of Delegates from District 29-C is affirmed, with costs. Mandate to issue forthwith.

OPINION

ELDRIDGE, Judge.

The dispute in this case is over the validity of absentee ballots cast in the 1994 general election for House of Delegates seat 29-C. This Court issued an order on January 10, 1995, affirming the circuit court's judgment which had upheld the decision of local election officials to count the challenged ballots. We now set forth the reasons for our order.

I.

Appellant Pelagatti and appellee O'Donnell were candidates for the 1994 general election for the House of Delegates seat for District 29-C which includes parts of Calvert and St. *428 Mary's Counties. [FN1] The election was held on November 8, 1994, and the next day the Boards of Supervisors of Elections for both counties canvassed the votes. Prior to the counting of any absentee ballots, Pelagatti had received a total of 5,565 votes and O'Donnell had received 5,539 votes, a difference of 26 votes in Pelagatti's favor.

[FN1. District 29-C was created under the 1992 Legislative Districting Plan and went into effect with the 1994 primary and general elections. It encompasses the southern portion of Calvert County and two precincts in St. Mary's County. Maryland Code (1984, 1995 Repl.Vol.), § 2-202(29)(c), 2-203 of the State Government Article.

On November 10, 1994, the Calvert County Board of Supervisors of Elections [FN2] met to count the 494 absentee ballots which it had received. [FN3] After an initial count of 175 absentee ballots, a representative of one of the candidates for Governor

raised the question of whether each absentee ballot previously counted had been accompanied by an "Application for Absentee Ballot." These applications were supplied by the State Administrative Board of Election Laws, and, according to the representative of the gubernatorial candidate, an application was required by Maryland Code (1957), Art. 33, § 27-4, to be returned by a voter to the Board of Supervisors of Elections *429 prior to the issuance of an absentee ballot. Section 27-4 states:

FN2. For purposes of canvassing ballots, the local Boards of Supervisors of Elections serve as the boards of canvassers. Code, (1957, 1993 Repl.Vol.), Art. 33, § 17-2(a). The duties of the board of canvassers in counting absentee ballots is set out in Art. 33, § 27-9(b), as follows:

"(b) Duties of boards.--(1) Subject to the provisions of paragraph (2), at any time after 4 p.m. on the Wednesday following election day and not later than the canvass of the votes cast at the regular voting places in this State at any election, the several boards shall meet at the usual place for holding the circuit court for the county or at the usual offices of the board and shall proceed to count, certify and canvass the absentee ballots contained in the ballot envelopes. Each board of canvassers shall keep the ballots safe from tampering until the canvass is completed. The state Administrative Board of Election Laws and the several boards shall take all appropriate and feasible steps to protect the privacy of all absentee ballots.

"(2) The canvass may not be completed until all absentee ballots that have been received timely have been counted."

FN3. In addition to the absentee ballots received in Calvert County, a total of 78 absentee ballots were also cast in St. Mary's County. The parties have not challenged the validity of these 78 absentee ballots.

"Except as provided in § 27-2 of this article, a qualified voter desiring to vote at any election as an absentee voter shall make application in writing to the board for an absentee ballot, which application must be received not later than the Tuesday preceding the election. The application shall contain an affidavit, which need not be under oath but which shall set forth such information, under penalty of perjury, **239 as may be required by the State Administrative Board of Election Laws. Upon

receipt of the application the board shall issue, to the voter or a duly authorized agent, an absentee ballot."
[FN4]

[FN4]. According to the evidence in this case, voters who would be absent from their precinct on the day of election would contact the Board of Supervisors of Elections and request in writing an absentee ballot. The request form used by the Calvert County Board stated that "I would like to receive an application to vote by Absentee Ballot because" and then listed the permissible reasons, requiring the applicant to check one of them. The form contained a place for the voter's address, and required the voter's signature. In response to this request, the Board, before sending the ballot, would ordinarily send an "Application For Absentee Ballot" to be completed and returned by the voter, and then upon the receipt of this application, the Board would issue the ballot. Some requests for absentee ballots, however, were made so close to the election that the Board thought that it would be impossible to

have the voter fill out and return the application for an absentee ballot and then be sent the actual ballot within the statutorily prescribed time. Thus, in order not to disenfranchise these voters, the Board sent the ballot to them without first requiring the receipt of an application for an absentee ballot.

Specifically, the representative of the gubernatorial candidate maintained that the application for an absentee ballot contains statutorily prescribed language, in the form of an affidavit, by which the registered voter, by signing the application, affirms under penalty of perjury that he or she is eligible to vote as an absentee. [FN5] Accordingly, the representative's *430 argument continued, if an absentee ballot was received that did not have a corresponding signed application containing an affidavit, the ballot should not have been counted.

[FN5]. The pre-printed form supplied by the State Administrative Board of Election Laws was as follows:

"STATE OF MARYLAND
BOARD OF SUPERVISORS OF ELECTIONS OF
_____ COUNTY OR BALTIMORE CITY

1994 GUBERNATORIAL ELECTIONS
APPLICATION FOR ABSENTEE BALLOT--REGISTERED VOTER
(Print All Information Except Signature)

Under penalty of perjury, I, _____
(Full Name)

Address _____
(No. and Street) (City or Post Office) (Zip Code)

a registered voter of _____ County or Baltimore City, MD

Telephone Number(s) _____ Date of Birth _____
(Month-Day-Year)

Party Affiliation _____ Note: Only voters affiliated with the Democratic or Republic Party may vote for candidates, including candidates for circuit court judge, to be nominated at a closed primary election of that party. All registered voters may vote in a general election and in a Board of Education or other nonpartisan primary.

hereby apply for an absentee ballot in the following election(s):

(check one or both) _____ Primary Election of September 13, 1994.
_____ General Election of November 8, 1994.

I am unable to vote in person and am entitled to vote by absentee ballot under Article 33 of the Maryland Code. (Review qualification and deadline information on reverse side of application).

(Date) (Signature of Voter--sign as registered) "

In light of the question raised by the representative of the candidate for Governor, the Board reexamined the ballot envelopes from which the first 175 absentee ballots had ****240** been removed and counted. The Board determined that 25 of these ballots did not have corresponding applications for an absentee ballot. When this irregularity was discovered, however, the 175 ballots had been separated from their envelopes, and the ballots lacked identifying characteristics once removed from their envelopes. Thus, although it could be determined ***431** from the envelopes that 25 ballots did not have corresponding applications for absentee ballots, it was impossible to ascertain from the documents which 25 of the 175 ballots fell into this category. Therefore, the Board could not determine how many of the 25 ballots were for Pelagatti and how many of the 25 ballots were for O'Donnell because of the commingling. [FN6]

FN6. On November 10, 1994, the State Administrative Board of Election Laws sent a memorandum by fax to the local election boards highlighting the potential problem of counting ballots that did not have corresponding applications for absentee ballots. According to testimony presented in circuit court, however, the Calvert County Board of Supervisors of Elections did not receive the memorandum until after the completion of counting the absentee ballots.

After this concern was raised, measures were taken to segregate the remaining ballots to be counted that did not have the accompanying application for an absentee ballot. It was discovered that 19 additional ballots also lacked applications. Despite this alleged irregularity, however, the Board included these 19 ballots in its final count and also included all 175 absentee ballots counted previously. [FN7] The final election ***432** tally, including all absentee ballots from both counties, certified by the Boards of Supervisors of Elections for Calvert and St. Mary's Counties on November 18, 1994, was 5,807 for Pelagatti and 5,839 for O'Donnell, a difference of 32 votes in

O'Donnell's favor.

FN7. The colloquy in the circuit court between Pelagatti's attorney and the administrator of the Calvert County Board of Supervisors of Elections regarding the decision to count the allegedly tainted ballots was as follows: "Q. Was there a process that you used or that the Board used to determine whether or not they were going to accept those votes?

A. Yes, the Board grouped together and discussed it, and it was under the opinion of the Board, as a majority, that they would segregate the ballots and count them ... at the end, so that if need be--if the votes needed to be removed or kept in, they were there and the count was there.

Q. But it was their decision to go ahead and include those in the final tally of the total that--

A. No. The final decision was left up to the State Board [of Elections].

Q. But when you certified the results of the election were those--

A. Yes, when I certified the results of the election I called the State Board to ask them, do I include those votes or take them out, and they said I was to include all votes until further notified.

* * * * *

Q. It's my understanding that in order to reject a vote it has to be a unanimous decision of the Board, is that correct?

A. Yes

Q. And there was no unanimous decision of the Board to reject any of these votes that you had segregated.

A. Right."

On November 23, 1994, Pelagatti filed in the Circuit Court for Calvert County a "Petition to Appeal and Contest Election," requesting that the court order the Board of Supervisors of Elections of Calvert County not to count

certain absentee ballots or, alternatively, to order a new election. Pelagatti's petition, as amended, named as defendants the Board of Supervisors of Elections for Calvert County, the State Administrative Board of Elections Laws, and O'Donnell.

At the circuit court hearing, Pelagatti argued that Art. 33, § 27-4, required that a registered voter, wishing to cast an absentee ballot, complete an application that sets forth in affidavit form that the person is eligible to vote as an absentee. Specifically, Pelagatti focused on the language in § 27-4 that states that the "application shall contain an affidavit, which need not be under oath but which shall set forth such information, under penalty of perjury, as may be required by the State Administrative Board of Election Laws." He maintained that this language requires an absentee voter to warrant by affidavit that he or she is entitled to vote absentee, and the language and voter's signature on the application for an absentee ballot satisfies this requirement. Moreover, Pelagatti contended that because 44 absentee ballots cast in the election for the seat in the House **241 of Delegates from District 29-C lacked the accompanying applications for absentee ballots, these ballots should not have been counted.

Pelagatti acknowledged, however, that 25 of the 44 ballots had been commingled with proper ballots before anyone had raised the issue, that, therefore, it was impossible to determine whether the 25 ballots were for O'Donnell or himself, *433 and that rejection of the remaining 19 identifiable ballots would not alter the outcome of the election. Consequently, in addressing the issue of whether the election outcome would have been different if the improper ballots had not been counted, Pelagatti argued that all Calvert County absentee ballots cast in the election were "tainted" and should be rejected. Alternatively, he maintained that, because 25 of the invalid ballots were commingled with 150 proper ballots, all 175 ballots should be discarded, along with the additional 19 ballots later found to be lacking applications. [FN8] Finally, he suggested that the 44 improper ballots alone "might" alter the outcome of the election, with Pelagatti winning by 1 to 4 votes. [FN9]

[FN8]. Of the 175 ballots received prior to discovering that 25 ballots were missing applications for absentee ballot, 96 ballots were for O'Donnell, 66 were for Pelagatti, and 3 were for neither candidate. In addition, of the 19

segregated ballots found to be lacking applications, 14 were for O'Donnell, 3 were for Pelagatti, and 2 were for neither candidate. Subtracting all of these votes from both candidates would result in a final ballot count of 5,738 for Pelagatti and 5,729 for O'Donnell, a difference of 9 votes in Pelagatti's favor.

[FN9]. The final election results showed that O'Donnell had won by 32 votes. Of the 44 presumably invalid ballots, 19 were segregated when counted, and the results of those ballots were 14 for O'Donnell, 3 for Pelagatti, and 2 for neither candidate. Thus, Pelagatti argued that taking 14 ballots from O'Donnell and 3 from himself would reduce the gap between the candidates to 21 votes. In addition, Pelagatti assumed that O'Donnell received at least 22 votes from the remaining 25 allegedly improper ballots, and he would also have removed these ballots from O'Donnell's total, leaving as a possible result a victory for Pelagatti by as much as 4 votes or as little as 1 vote. Pelagatti's "assumption" that 22 of the 25 commingled ballots contained votes for O'Donnell was not supported by any evidence.

In response, O'Donnell contended that the ballots were not invalid for lack of corresponding applications for absentee ballots. Rather, according to O'Donnell, the written request for an absentee ballot application and the absentee ballot envelope, signed by the voter, substantially complied with the requirement set forth in Art. 33, § 27-4. [FN10] In addition, O'Donnell *434 asserted that if 44 ballots were in fact invalid, 25 of these 44 ballots were commingled with 150 concededly valid ballots, and that the 25 invalid ballots should not result in the disenfranchisement of 150 **242 voters casting valid ballots. O'Donnell maintained that Pelagatti had failed to meet his burden of proof that the outcome of the election would have been different without the invalid ballots. Finally, O'Donnell asserted that Pelagatti should be barred from challenging the validity of the 25 commingled ballots when neither he nor his representative raised the issue prior to the counting and commingling of the absentee ballots.

[FN10]. The language on the back of the ballot envelope appeared as follows:

"OATH OF ABSENTEE VOTER
PRINT ALL INFORMATION EXCEPT SIGNATURE

"I, _____, do hereby swear (or affirm) that I am legally

qualified to vote in the _____ Election to be held on _____; that I reside in _____ City or County, Maryland, as stated in my application for absentee voting; that I will be unable to vote in person on

the day of such election and am entitled to vote by absentee ballot under Article 33 of the Maryland Code or the Overseas Citizen Voting Rights Act of 1975; that I have not voted nor do I intended to vote elsewhere in this election. The within ballot was voted by me. The ballot, if mailed, was completed and mailed no later than the day before the election.

Signature of Absentee Voter

WARNING: Any person who shall violate any of the provisions of the Election Code governing absentee voting shall, upon conviction, be sentenced to pay a fine of not more than one thousand dollars (\$1,000), or be sentenced to imprisonment for not more than two years, or both, in the discretion of the court."

Following the hearing, the circuit judge denied Pelagatti's request for relief, stating:

"The Court does not find that there's any law or requirement that under these circumstances ... any ballot should be thrown out.... [T]he court does not believe their ballots would be thrown out anyway because they had done all they needed to [do in order to be] eligible voters. The only thing [the voters] didn't do, and it wasn't their fault, they didn't get around the law or not comply intentionally with the statute, they were never told the other things they *435 had to do to vote absentee.... So, the Court feels it would be a substantial injustice to disenfranchise the 150 people who went through the process and did so because 25 others and 19 others voted in good faith...."

Pelagatti immediately noted an appeal, and on January 9, 1995, this Court issued a writ of certiorari prior to any proceedings in the Court of Special Appeals. As previously mentioned, on January 10, 1995, after hearing oral argument, this Court affirmed the circuit court's judgment in favor of O'Donnell.

II.

Both in the circuit court and in this Court, Pelagatti argued that the basis for his action was Code (1957, 1993 Repl. Vol.), Art. 33, subtitle 19, consisting of § § 19-1 through 19-5. Subtitle 19 of the Election Code provides in relevant part as follows:

"§ 19-2. Judicial challenges.

If no other timely and adequate remedy is provided by this article, and by filing a petition in accordance with the provisions of § 19-3 of this subtitle, any registered voter may seek judicial relief from any act or omission

relating to an election, whether or not the election has been held, on the grounds that the act or omission:

- (1) Is inconsistent with this article or other law applicable to the elections process; and
- (2) May change or have changed the outcome of the election."

* * * * *

"§ 19-5. Judgment.

Upon a finding, based upon clear and convincing evidence, that the act or omission involved materially affected the rights of interested parties or the purity of the elections process and:

- (1) Might have changed the outcome of an election already held, the court shall:

*436 (i) Declare null and void the election for the office, offices, question, or questions involved and order that the election be held again on a date set by the court; or
(ii) Order any other relief that will provide an adequate remedy."

* * * * *

According to Pelagatti, the Board's counting 44 absentee ballots which had no corresponding applications constituted an "act" which was "inconsistent with" § 27-4 of Article 33, and this act "[m]ight have changed the outcome of" the election, within the meaning of Art. 33, § § 19-2(1) and 19-5(1). In this Court, Pelagatti requested "the Court to disqualify the [19] separated improper votes as well as the 175 votes which were commingled with the 25 improper votes. Alternatively, we ask[] the Court to disqualify all of the absentee ballots." (Appellant's brief at 12).

[1] Although we do not suggest that the result in this case would have been any different if subtitle 19 of the Election Code were the appropriate statutory basis for Pelagatti's action, we point out that this action was not authorized by subtitle 19. Section 19-2 authorizes a judicial action by a registered voter only "[i]f no other timely and adequate remedy is provided by this article...." [FN11] Art. 33, § 27-10, does provide a **243 timely and adequate judicial review remedy for, *inter alia*, "[c]ontests concerning ... the validity of any ballot under this subtitle...." [FN12]

FN11. With regard to the requirements for maintaining an action and obtaining relief under Art. 33, § § 19-1 through 19-5, see Snyder v. Glusing, 308 Md. 411, 520 A.2d 349 (1987); Snyder v. Glusing, 307 Md. 548, 515 A.2d 767 (1986). See also Kelly v. Vote Know Coalition, 331 Md. 164, 171 n. 2, 626 A.2d 959, 963 n. 2 (1993).

FN12. Art 33, § 27-10, provides as follows:

"§ 27-10. Contests and appeals.

(a) *Decisions by board.*--Contests concerning registration, voting or the validity of any ballot under this subtitle shall be decided by the board having jurisdiction of the matter.

(b) *Unanimous vote by board.*--No registration shall be denied and no ballot rejected except by the unanimous vote of the entire board.

(c) *Right to [judicial review].*--Any candidate or absentee voter aggrieved by any decision or action of such board shall have the right of [judicial review in] the circuit court for the county to review such decision or action, and jurisdiction to hear and determine such [actions] is hereby conferred upon said courts.

(d) *Procedure for [judicial review].*--Such [actions] shall be taken by way of petition filed with the appropriate court within five days from the date of the completion of the official canvass by any board of all the votes cast at any election and shall be heard de novo and without a jury by said court as soon as possible.

(e) *Appeal to Court of Special Appeals.*--There shall be a further right of appeal to the Court of Special Appeals, provided such appeal shall be taken within 48 hours from the entry of the decision of the lower court complained of, and all such appeals shall be heard and decided on the original papers, including a typewritten transcript of the testimony taken in such cases, by the Court of Special Appeals, as soon as possible after the same have been transmitted to that Court.

(f) *Transmission of record to Court of Special Appeals.*--The original papers, including the

testimony, shall be transmitted to the Court of Special Appeals within 5 days from the taking of the appeal."

*437 Pelagatti's complaint was that 44 absentee ballots were invalid under § 27-4, which is in the same subtitle as § 27-10. Pelagatti was a candidate who was aggrieved by the Board's decision concerning the ballots; consequently, he was entitled to judicial review of the Board's decision under § 27-10(c). Because of the availability of the judicial review action under § 27-10, no action could be brought by Pelagatti under subtitle 19. Moreover, Pelagatti's judicial action was timely under the requirements of § 27-10(d), (e) and (f).

III.

This Court has, "on a number of occasions, expressed the view that 'unimportant mistakes made by election officials should not be allowed to thwart the will of the people freely expressed at the ballot box' or that 'mere irregularities ... should not be allowed to set aside what the voters have decided.'" Lamb v. Hammond, 308 Md. 286, 310-311, 518 A.2d 1057, 1069 (1987), quoting Wilkinson v. McGill, 192 Md. 387, 393, 395, 64 A.2d 266, 269-270 (1949).

[2] As stated by the Court in McNulty v. Board of Elections, 245 Md. 1, 8-9, 224 A.2d 844, 848 (1966), "[i]t is ... *438 axiomatic that unnecessary disenfranchisement of voters due to minor errors or irregularities in casting their ballots, in the absence of fraud, should be avoided." The Court went on to point out that where an election board's error "does not interfere with the fair expression of the will of the voters, the result of the election need not be disturbed." 245 Md. at 9, 224 A.2d at 849. See also, e.g., Mahoney v. Sup. of Elections, 205 Md. 380, 390, 109 A.2d 110, 115 (1954) ("avoidance of the unnecessary disenfranchisement of voters due to minor errors or irregularities in marking their ballots" is important); Mahoney v. Sup. of Elections, 205 Md. 325, 336, 108 A.2d 143, 147-148 (1954); Town of Landover Hills v. Brandt, 199 Md. 105, 109, 85 A.2d 449, 451 (1952); White v. Laird, 127 Md. 120, 126, 96 A. 318, 320 (1915) (stating, with regard to the contention that primary election ballots were not marked with precisely the type of pencil prescribed by the law, that "it might have a tendency to cause the average voter to believe that the primary election law of Maryland is a snare and delusion, rather than a method of obtaining honest nominations, if Courts must hold ballots to be invalid for such reasons"); Coulehane v. White, 95 Md. 703, 53 A. 786 (1902).

In addition, as pointed out by Judge Wilner for this Court in Lamb v. Hammond, *supra*, 308 Md. at 311, 518 A.2d at 1069, the **244 Court has "endeavored to sustain votes

that were in substantial compliance with the requirements of law." See also Hammond v. Love, 187 Md. 138, 145-146, 49 A.2d 75, 78 (1946) ("partial compliance [with a legal requirement], notwithstanding non-compliance in some details, may constitute such substantial compliance that the election or the vote in question will not be invalidated"); Roe v. Wier, 181 Md. 26, 30, 28 A.2d 471, 473 (1942).

[3] On the other hand, "we have never sanctioned the counting of ballots that were plainly in violation of a law particularly designed to protect the integrity of the elective process." Lamb v. Hammond, *supra*, 308 Md. at 311, 518 A.2d at 1069. Or, as Chief Judge Marbury explained for the Court in *439Wilkinson v. McGill, *supra*, 192 Md. at 395, 64 A.2d at 270, the general principle that irregularities will not invalidate ballots or elections does not apply when election officials violate "a preemptory requirement designed to safeguard the integrity of elections, the neglect of which presents an apparent opportunity for fraud." See also Hammond v. Love, *supra*, 187 Md. at 146-149, 49 A.2d at 78-80. Nevertheless, "the burden of showing that the action of the Supervisors [of Elections] has been clearly illegal is not a light one." Mahoney v. Sup. of Elections, *supra*, 205 Md. at 390, 109 A.2d at 115.

In light of these principles, there may well be merit in O'Donnell's argument that the 44 absentee ballots were not invalid and that there was substantial compliance with the requirements of Art. 33, § 27-4. The written and signed request for an application for an absentee ballot, coupled with the signed absentee ballot envelope, appeared to contain all of the information which would have been contained in the application for an absentee ballot. The circuit court in this case found that the voter, by signing the absentee ballot envelope, attested to the same facts that the voter would have attested to if he or she had signed an application for an absentee ballot. Furthermore, there was not a shred of evidence that any of the Calvert County absentee ballots counted by the Board were cast by ineligible persons. In addition, there is no evidence that any voter was able to vote twice, once by absentee ballot and once personally. [FN13]

FN13. The following testimony was elicited during the circuit court hearing from the Administrator of the Calvert County Board of Supervisors of Elections:

"Q. How do you ensure that an individual that voted absentee ... [did] not vote personally at the polls?

"A. When a person is sent an absentee ballot, we have a computer system in our office and we input their name and address and all the

information, that they applied for a ballot, a ballot was sent, and it's also written on the top of each paper that goes into those notebooks. Then, we input them into a State computer system which removes them from the computer runs that would go to the polling houses. If time is of the essence ... we take a magic marker and mark that person's name out of the precinct book that goes to the polling house."

***440** Under all of these circumstances, and considering the principles set forth in the Maryland cases, it would not seem that Pelagatti met his burden of showing that the 44 absentee ballots, not accompanied by applications on the form specified by the State Administrative Board of Election Laws, were clearly illegal. [FN14]

FN14. It is noteworthy that Ch. 2 of the Acts of 1996, *inter alia*, amended Art. 33, § 27-4, to delete the requirements that an application for an absentee ballot contain an affidavit and that the information be given under penalty of perjury. According to the bill analysis prepared by the House of Delegates Commerce and Government Matters Committee on H.B. 128, which became Ch. 2, the bill was recommended by the Maryland Task Force to Review the State's Election Law based on its finding

"that for a number of years some local election boards accepted signed letters of application for an absentee ballot without the required affidavit. After the 1994 gubernatorial election this practice was challenged and the validity of hundreds of ballots was questioned although the ballot envelope in which the ballots were returned bore a signed affidavit. The Task Force reported that because an affidavit is already required on the actual ballot envelope, the first affidavit in connection with the *application* for an absentee ballot is redundant."

IV.

[4] Nevertheless, even if we assume *arguendo* that the absentee ballots not accompanied by applications were clearly illegal, ****245** Pelagatti would not have prevailed. In order to invalidate or change the results of the election in a case such as this, the challenger must demonstrate that the illegality altered the outcome of the election. See, e.g., McNulty v. Board of Elections, *supra*, 245 Md. at 11-13, 224 A.2d at 849-851; Mahoney v. Sup. of Elections, *supra*, 205 Md. at 395, 109 A.2d at 118 ("If there were any such [illegal ballots], they were too few in number to alter the result of the election"); Mahoney v. Sup. of Elections, *supra*, 205 Md. at 335, 108 A.2d at 147 (an election challenger is not entitled "to demand an abstract right

which would be unaccompanied by any substantial benefit.... In the instant cases it was beyond dispute that if the challenged ballots were rejected the petitioner would obtain the majority"); *441*Town of Landover Hills v. Brandt, supra*, 199 Md. at 109, 85 A.2d at 451; *Wilkinson v. McGill, supra*, 192 Md. at 395, 64 A.2d at 271 (stating, with regard to several alleged election illegalities, that "none of them are shown to have affected the ultimate result, and ... they should not be allowed to set aside what the voters have decided").

[5] Moreover, in determining whether invalid ballots affected the outcome of an election, the courts will not guess or speculate or "resort to probability" as to which candidate or which side of an issue the invalid ballots favored. *McNulty v. Board of Elections, supra*, 245 Md. at 11, 224 A.2d at 850; *Wilkinson v. McGill, supra*, 192 Md. at 402-403, 64 A.2d at 274. Instead, the party challenging the election results has the burden of proving that the illegality changed the outcome of the election.

[6] For example, in *Wilkinson v. McGill, supra*, 192 Md. 387, 64 A.2d 266, this Court considered whether the casting of illegal votes should invalidate a referendum election with respect to an Act creating a sanitary district in Allegany County. According to the Court (192 Md. at 392, 64 A.2d at 269),

"there was an illegal registration of 26 people of whom 23 voted; and that as the majority in favor of the Act was only 16, these illegal votes, if cast in favor of the Act, carried the election, whereas, if they had not voted, it is probable that the election would have been decided the other way."

In rejecting the plaintiff's argument that the election should be set aside because the 23 illegal ballots probably affected the outcome of the election, Chief Judge Marbury, after reviewing numerous cases throughout the country, explained for the Court (*Wilkinson v. McGill, supra*, 192 Md. at 402, 64 A.2d at 274):

"The question is by no means free from difficulty, but we think the weight of authority and the better reasoning uphold the view that complainants, desiring to avoid an election because illegal votes are cast, have upon them the burden of proving for whom these votes are cast. They cannot thrust that burden upon the Court by arguing that *442 there is a probability that such votes were cast for the side having the majority. They must prove, or at least attempt to prove, how the illegal voters voted. If direct proof cannot be obtained from the illegal voters themselves, other evidence of a circumstantial nature may be offered."

Similarly, in *McNulty v. Board of Elections, supra*, 245 Md. 1, 224 A.2d 844, this Court considered whether a candidate for the Democratic nomination for State Senator

could be awarded 136 ballots that had been cast in error, with the result that none of the 136 ballots were credited to any of the candidates in the election. The error occurred when election officials failed, in violation of the law, to lock lever 7E on the voting machine and to cover line E in column 7. There were four candidates for the nomination, and McNulty was listed fourth in column 7. His corresponding lever was 7D. McNulty argued that his campaign slogan, which requested voters to vote the "bottom line," meant (245 Md. at 8, 224 A.2d at 848)

"that the obvious intention of the 136 voters who had cast votes in block 7E, [the bottom line], was to vote for him and that since the [Board of Elections] had found that this was 'probably' their intention, these 136 votes should be awarded to him...."

**246 If the 136 votes had been awarded to McNulty, he would have been the winner.

In rejecting McNulty's argument, this Court discussed *Wilkinson v. McGill, supra*, and reiterated that an election would not be set aside based on the argument that " 'there is a probability that the [illegal] votes were cast for the side having the majority.' " 245 Md. at 11, 224 A.2d at 850. The Court continued (*ibid.*):

"The problem of ascertaining for whom the 136 votes in the present case were intended, is far more complicated than in *Wilkinson, supra*, because in this case no one knows who any of the 136 people may be who pulled lever 7E, intending to vote for McNulty.... Certainly applying the rationale of *Wilkinson*, to the present case, it eliminates the resort to 'probability' urged by the appellant."

*443 The Court in *McNulty* went on to reject a test based upon " 'what the Court guesses ' " would have happened but for the illegality. 245 Md. at 12, 224 A.2d at 850, quoting with approval *In re Primary Election April 28, 1964*, 415 Pa. 327, 203 A.2d 212, 216, 219, *cert. denied*, 379 U.S. 846, 85 S.Ct. 86, 13 L.Ed.2d 51 (1964).

Applying these principles to the present case, it is clear that Pelagatti failed to show that the allegedly invalid absentee ballots changed the outcome of the election. These ballots would have altered the outcome only if a high percentage of the 25 commingled ballots had been cast for O'Donnell. There is utterly no evidence in this case disclosing for whom any of these 25 ballots had been cast. [FN15] It would be pure speculation for a court to assume that a sufficient number of the 25 ballots had been cast for O'Donnell so as to affect the outcome. Such an exercise in guesswork is not permitted in an action under Art. 33, § 27-10.

FN15. Although "probability" is not the test in this case, it is noteworthy that the only evidence concerning "probability" was against Pelagatti's

position. At the circuit court hearing, O'Donnell called as a witness a statistician. This witness, calculating the probability of Pelagatti winning the election under the various hypotheticals Pelagatti proffered, concluded that the "probability of Mr. Pelagatti winning is less th[an] one-half of one percent" or "less than one in a million."

343 Md. 425, 682 A.2d 237

END OF DOCUMENT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

THE HONORABLE JOHN E. BRIDGES

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CHELAN COUNTY

Timothy Borders et al.,

 Petitioners,

 v.

King County et al.,

 Respondents,

and

Washington State Democratic Central
Committee,

 Intervenor-Respondent.

NO. 05-2-00027-3

CERTIFICATE OF SERVICE

The undersigned is a citizen of the United States and resident of the State of
Washington, is over the age of eighteen and is not a party to the within action.

1 The following documents were caused to be served:

- 2
3 1. Letter to Clerk of Chelan County Superior Court;
4
5 2. Washington State Democratic Central Committee's Reply in Support of Its
6 Motion in Limine to Exclude Petitioners' Proposed Speculative Attribution of
7 Illegal Votes;
8
9
10
11 2. Supplemental Declaration of William C. Rava in Support of Washington
12 State Democratic Central Committee's Motion in Limine to Exclude
13 Petitioners' Proposed Speculative Attribution of Illegal Votes;
14
15
16
17 4. Letter to Judge Bridges regarding Washington State Democratic Central
18 Committee's Motion in Limine to Exclude Petitioners' Proposed Speculative
19 Attribution of Illegal Votes; and
20
21
22
23 5. Certificate of Service.

24 These documents were served in the manner described below.
25
26
27

28 Thomas F. Ahearne	<input checked="" type="checkbox"/>	E-Service Via E-Filing.com
29 Foster Pepper & Shefelman PLLC	<input type="checkbox"/>	Via Electronic Mail
30 1111 Third Avenue, Suite 3400	<input type="checkbox"/>	Via Overnight Mail
31 Seattle, WA 98101-3299	<input type="checkbox"/>	Via U.S. Mail, 1 st Class, Postage
32 Email: ahearne@foster.com		Prepaid
33 <i>Attorneys for Respondent Secretary of State</i>	<input type="checkbox"/>	Via Facsimile
34 <i>Sam Reed</i>		

35
36
37
38
39
40
41
42
43
44
45
46
47

1 Jeffrey T. Even, Assistant Attorney General
2 P.O. Box 4100
3 Olympia, WA 98504-0100
4 Email: jeffe@atg.wa.gov
5 *Attorneys for Respondent Secretary of State*
6 *Sam Reed*

☒ E-Service Via E-Filing.com
☐ Via Electronic Mail
☐ Via Overnight Mail
☐ Via U.S. Mail, 1st Class, Postage
Prepaid
☐ Via Facsimile

9 Harry J.F. Korrell
10 Robert Maguire
11 Davis Wright Tremaine LLP
12 2600 Century Square, 1501 Fourth Avenue
13 Seattle, WA 98101
14 Email: robmaguire@dwt.com;
15 harrykorrell@dwt.com
16 *Attorneys for Petitioners*

☒ E-Service Via E-Filing.com
☐ Via Electronic Mail
☐ Via Overnight Mail
☐ Via U.S. Mail, 1st Class, Postage
Prepaid
☐ Via Facsimile

19 Richard Shepard
20 John S. Mills
21 818 S. Yakima Avenue, Suite 200
22 Tacoma, WA 98405
23 Email: richard@shepardlawoffice.com
24 *Attorneys for the Libertarian Party*

☒ E-Service Via E-Filing.com
☐ Via Electronic Mail
☐ Via Overnight Mail
☐ Via U.S. Mail, 1st Class, Postage
Prepaid
☐ Via Facsimile

27 Gary A. Reisen
28 Chelan County Prosecutor's Office
29 P.O. Box 2596
30 Wenatchee, WA 98807-2596
31 Email: Gary.Riesen@co.chelan.wa.us
32 *Attorneys for Respondent Chelan County*
33 *and Chelan County Auditor*

☒ E-Service Via E-Filing.com
☐ Via Electronic Mail
☐ Via Overnight Mail
☐ Via U.S. Mail, 1st Class, Postage
Prepaid
☐ Via Facsimile

36 Timothy S. O'Neill, Klickitat County
37 Prosecuting Attorney
38 Shawn N. Anderson, Klickitat County
39 Prosecuting Attorney
40 205 S. Columbus Avenue, MS-CH-18
41 Goldendale, WA 98620
42 Email: timo@co.klickitat.wa.us
43 *Attorneys for Respondent Klickitat County*

☒ E-Service Via E-Filing.com
☐ Via Electronic Mail
☐ Via Overnight Mail
☐ Via U.S. Mail, 1st Class, Postage
Prepaid
☐ Via Facsimile

1 Barnett N. Kalikow
2 Kalikow & Gusa, PLLC
3 1405 Harrison Ave NW, Suite 207
4 Olympia, WA 98502
5 Email: barnett.kalikow@gte.net
6 *Attorneys for Respondent Klickitat County*
7 *Auditor*

- ☒ E-Service Via E-Filing.com
☐ Via Electronic Mail
☐ Via Overnight Mail
☐ Via U.S. Mail, 1st Class, Postage
Prepaid
☐ Via Facsimile

10 L. Michael Golden, Senior Dep. Pros. Atty.
11 Office of the Lewis County Prosecuting
12 Attorney
13 360 NW North Street
14 Chehalis, WA 98532-1900
15 Email: lmgolden@co.lewis.wa.us
16 *Attorneys for Respondent Lewis County*
17 *Auditor*

- ☒ E-Service Via E-Filing.com
☐ Via Electronic Mail
☐ Via Overnight Mail
☐ Via U.S. Mail, 1st Class, Postage
Prepaid
☐ Via Facsimile

20 Gordon Sivley
21 Michael C. Held
22 Snohomish County Prosecutors Office
23 2918 Colby, MS 504
24 Everett, WA 98201
25 Email: gsivley@co.snohomish.wa.us;
26 mheld@co.snohomish.wa.us
27 *Attorneys for Respondents Snohomish*
28 *County and Snohomish County Auditors*

- ☒ E-Service Via E-Filing.com
☐ Via Electronic Mail
☐ Via Overnight Mail
☐ Via U.S. Mail, 1st Class, Postage
Prepaid
☐ Via Facsimile

32 I declare under penalty of perjury that the foregoing is true and correct, and that this
33 certificate was executed in Seattle, Washington on April 25th, 2005.

34
35
36
37
38
39
40 By

Sherri Wyatt